90-1 00

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1990

R. O. SEGRAVES, PETITIONER

v.

RALPH M. PARSONS COMPANY,
a Nevada Corporation;
FELIX CUMARE, an individual;
and DOES 1 through 30, inclusive,

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

ROBERT O. SEGRAVES, PETITIONER
138 West Main St. - Suite 124
Ventura, CA 93001
(805) 985-4238

QUESTIONS PRESENTED

1. Whether a state court may deny indigents, filing In Forma Pauperis, reporters transcripts on appeal based on a state appellate court decision that is contrary to state statutes and the constitutions of the state and the United States regarding due process and equal protection under state and federal laws.
2. Whether courts may order re-examination of a fact tried by a jury.
3. Whether state courts (appellate or others) may violate state statutes without being held accountable in Writ of Mandate proceedings before the state's supreme court.
4. Whether state courts may ignore the clear intent of state statutes.
5. Whether courts may eliminate punitive damages for the tortious breach of the covenant when the party found guilty of malice is in a far superior position with respect to the other party to the contractual agreement.

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TABLE OF AUTHORITIES

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

No. _____

R. O. SEGRAVES, PETITIONER

v.

RALPH M. PARSONS COMPANY, et al

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

Petitioner ROBERT O. SEGRAVES petitions for a writ of Certiorari to review the judgement of the Supreme Court of the State of California.

OPINIONS BELOW

California's Supreme Court denied petitioner Segraves PETITION FOR REVIEW of an appellate court opinion in this case, his PETITION FOR WRIT OF MANDATE against lower courts and his APPLICATION FOR RECONSIDERATION. Copies of denials are attached herewith as Exhibits No.

I-a, I-b and I-c. Also attached are copies of following appellate court documents: Ex. II-DENIAL OF APPLICATION FOR WAIVER OF COURT FEES, Ex. III-PETITION FOR REHEARING DENIED, Ex. IV-Court's unpublished opinion. Also, attached is Exhibit V - The trial judge's opinion.

JURISDICTION

California Supreme Court denial of APPLICATION FOR RECONSIDERATION is dated March 23, 1990. On June 19, 1990 Justice O'Connor extended the time for filing to July 12, 1990. Jurisdiction of this Court is invoked under 28 USC 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

1. The Fifth Ammendment to the United States Constitution provides in relevant part:

   "No person shall ..... be deprived of life, liberty or property, without due process..

2. The Seventh Ammendment provides in part:

   "In suits at common law where the value in controversy shall exceed twenty dollars, ... no fact tried by a jury, shall be otherwise re-examined in any court of the United States .....

STATEMENT

Petitioner prevailed in unemployment insurance appeals initiated in February 1984 by employer. Finalized September 1985 by Writ of Mandate in the superior court, petitioner moved to apply that decision collaterally to the suit filed against employer February 1985 for defamation, infliction of emotional distress and wrongful termination of employment contract. Motion was denied by trial judge March 1989. Petitioner moved to Ammend Complaint by adding other tort causes of action including age discrimination; but, trial judge granted defendants Motion for Judgement of Nonsuit on most causes of action based on employer's qualified privileges. This left only Tortious Breach of Covenant for jury who found unanimously for petitioner and found employer guilty of malice which destroys privileges with respect to causes of action dismissed by Nonsuit Judgement; but, on post-trial motions the trial judge threw-out jury findings, including tort, punitive, and contract damages, and ordered a new trial on breach-of-contract

and contract damages only. On appeal indigent plaintiff/petitioner SEGRAVES filed In Forma Pauperis but was denied a free transcript in accordance with state statutes based on a previous appellate opinion denying an indigent a free transcript. That opinion of course conflicts with the state statutes and with state and federal Constitutions regarding the right to due process. It was not reasonable for that appellate court to conclude that the legislature would waive relatively low ($250) filing fees and then burden indigents with a much greater ($7,000) cost for a transcript. Inability to pay for a transcript was fatal to petitioner's appeal even though the right to due process was contended in his PETITION FOR REHEARING and in his PETITION FOR REVIEW. His argument that the trial judge's did not have the authority to throw-out the jury's findings was presented at all appeal levels. Nevertheless, his PETITION FOR REVIEW and his PETITION FOR ALTERNATIVE WRIT OF MANDATE was denied.

REASONS FOR GRANTING THIS PETITION

Issues raised by this PETITION FOR WRIT OF CERTIORARI on behalf of petitioner SEGRAVES, individually, and on behalf of other persons similarly situated, constitute important questions of federal law which have not been, but should be settled by this Court. Trial Judges should not be empowered to throw-out jury findings in civil cases and order new trials (US Cons Amm VII) because of a misapplication of a prior appellate opinion that judges have such power to throw-out jury convictions in criminal cases. Likewise, for state courts to throw-out damage verdicts is contrary to provisions of the US Constitution, Amm. 7.

For state courts to deny indigents free transcripts on appeal clearly denys those persons due process and equal treatment under state laws and Constitutions of the states and the US. Likewise, denial of a PETITION FOR WRIT OF MANDATE when it is clear that lower courts had violated statutes, also amounts to a denial of due process.

CONCLUSIONS

The PETITION FOR WRIT OF CERTIORARI should be granted; and, decisions of the courts of the State of California should be reversed with respect to indigents rights to due process as to free reporter's transcripts, waiver of fees for filing petitions for writ of mandate, and granting of alternative writs of mandate where it is clear that lower courts have violated state laws. Also, this court should make it perfectly clear that provisions of the Seventh Ammendment to the Constitution of the United States as written must be the law of this land by reversing decisions that caused the jury verdicts in this case to be thrown-out and the facts of this case ORDERED re-examined by a new trial; but, the latter should not preclude courts' authority to correct jury verdicts that are obviously not correct with respect to evidence regarding damages.

Respectfully submitted,

ROBERT O. SEGRAVES,
Petitioner

Juneteenth, 1990

Supreme Court of California

March 23, 1990

(COPY)

Robert O. Segraves
138 W. Main St. # 124
Ventura, CA 93001

Re: S013779 - Segraves v Ralph M. Parsons Co.

Dear Mr. Segraves:

Returned is the document captioned "Application for Reconsideration of Denial of Petition for Review" received March 23, 1990 for the reason that this court lost jurisdiction on March 14, 1990, the same date on which this court denied the petition for review. The period of jurisdiction is the period of time provided by law within which this court may consider the relief requested in your petition for review. Since it has now expired, the court is without power to consider any matters that may be contained in your petition.

Very truly yours,

ROBERT F. WANDRUFF
Court Administration and
Clerk of the Supreme Court

(signature)

By: Diane M. McHenry
Deputy Clerk

Exhibit I-a

(COPY)

SUPREME COURT
FILED
March 14, 1990
Robert Wandruff Clerk

ORDER DENYING ALTERNATIVE WRIT

No. S013805

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

R.O. SEGRAVES, Petitioner

v.

COURT OF APPEAL, SECOND APPELLATE DISTRICT, Respondent

Petition for writ of mandate DENIED.

(signed LUCAS)

Chief Justice

Exhibit I-b

(COPY)

SUPREME COURT
FILED
March 14, 1990
Robert Wandruff Clerk

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL

Second Appellate District, Division Two,
No. B042575
S013779

IN THE SUPREME COURT OF
THE STATE OF CALIFORNIA

IN BANK

R. O. SEGRAVES, Appellant

v.

RALPH M. PARSONS COMPANY Et Al., Redspondents

Appellant's petition for review DENIED.

LUCAS

Chief Justice

Exhibit I-c

(COPY)

OFFICE OF THE CLERK
COURT OF APPEAL
STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
ROBERT N. WILSON, CLERK

DIVISION: 4 DATE: 12/28/89

Robert O. Segraves
5753-G Santa Ana Canyon
Anmaheim, CA 92807

RE: Segraves, R. O.
VS.
Parsons, Ralph M.
2 Civil 30-7081
Los Angeles NO. C533582

THE COURT:

APPLICATION FOR WAIVER OF COURT FEES DENIED.

Exhibit II

(COPY)

NOT FOR PUBLICATION

IN THE COURT OF APPEAL OF
THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

R. O. SEGRAVES,	) No. B 042575
	)
Plaintiff and Appellant,	) Sup.Ct. No.
	) C 533582
v.	)
	)
RALPH M. PARSONS CO. et al.,	)
	)
Defendants and Respondents.	)
	)

COURT OF APPEAL. SECOND DIST.
FILED
DEC 20, 1989
ROBERT N. WILSON Clerk

Deputy Clerk

Introduction

Plaintiff, R.O. Segraves, filed suit against the Ralph M. Parsons Company and Felix Cumare (collectively, defendant) for libel and slander, intentional and negligient infliction of emotional distress, fraud, invasion of privacy breach of contract and breach of the covenant of good faith and fair dealing (wrongful termination). Defendant motion for judgement of nonsuit (Code Civ. Proc. Sec. 581c) was granted as to all causes of action except those for breach of contract and wrongful termination. A jury trial culminated in judgement on special verdict in favor of plaintiff for $ 478,612 in general damages, including $ 60,000 as damages for the wrongful termination of plaintiff's employment, and $ 1 in punitive damages.

The trial court granted defendant's motion for judgement notwithstanding the verdict (Code Civ. proc., Sec. 629) as to the $ 60,000 of the judgement awarded as damages for wrongful termination, and the $ 1 awarded as puni-

tive damages on the ground that these portions of the judgement were contrary to the rule of Foley v Interactive Data Corp. (1988) 47 Cal. 3d 654, as applied retroactively in Newman v. Emerson Radio Corp. (1989) 48 Cal.3d 973. Defendant's motion for new trial was also granted on the ground that the evidence was insufficient to justify the verdict for the remaining $ 418,612 in favor of plaintiff. This appeal followed.

Discussion

I

Inadequacy of the Record on Appeal

Upon filing his notice of appeal, plaintiff elected to proceed by appendix in lieu of clerk's transcript (Cal. Rules of Court, 5.1) and requested preparation of a reporter's transcript including all oral proceedings in the matter. Plaintiff subsequently withdrew his request for preparation of a reporter's transcript and notified the court of his intention to proceed on the judgement roll. (Cal. Rules of Court, 5(f).)

Plaintiff then filed an opening brief challenging, inter alia, the trial court's orders: (1) granting defendant's motion for for nonsuit as to all causes of action except those for breach of contract and wrongful termination; (2) granting defendant's motion for new trial based on insufficiency of the evidence; and (3) denying plaintiff's motions for new trial and for judgement notwithstanding the verdict on the damages issues.

In the rspondent's brief, it is asserted, among other arguments relating to the merits, that plaintiff has failed to provide this court with an adequate record to review these matters on appeal. We agree.

On appeal, it is the appellant's burden to affirmatively show error by an adequate record. (9 Witkin, Cal. Procedure (3d ed. 1985) Sec. 418, pp. 415-416.) Here, plaintiff elected to proceed by appendix and id not request a reporter's transcript. The appeal must be treated as a judgement roll appeal and only facts appearing in the trial court's findings may be considered. (Estate of Larson (1949)

92 Cal.App.2d 267, 269). The minute order for June 9, 1989 contains a seven-page summary of the evidence upon which the trial court relied in granting a new trial based upon insufficiency of the evidence. The evidence described by the order amply supports the trial court's findings that plaintiff was dismissed from employment for good cause and in good for: (1) falsification of company records, including time cards and expense reports; (2) misappropriation of company funds, including personal use of company credit cards; (3) repeated and prolonged unauthorized absence from the work place, field and/or from office premises; and (4) misuse of company facilities including telephones, for personal use. In all other respects, the evidence must be conclusively presumed to support the judgement and its sufficiency is not open to review (9 Witkin, Cal. Procedure (3d ed. 1985), Sec. 273, pp. 283-284; Wheelright v County of Marin (1970) 2 cal.3d 448, 454; Kompf v. Morrison (1946) 73 Cal.App.2d 284, 286).

Appellate review of a trial court's order granting a motion for nonsuit necessarily requires consideration of all the evidence presented to the trial court. (Campbell v. Security Pac. Nat. Bank (1976) 62 Cal.App.3d 379, 384-385). An evaluation of the sufficiency of the evidence is likewise necessary to assess the correctness of the trial court's orders granting a new trial, and denying plaintiff's various motions relating the adequacy of the damages awarded by the jury. Consideration of these questions is accordingly precluded because the appeal has been taken on the functional equivalent of the judgement roll. (Tagney v. Hoy (1968) 260 Cal.App.2d 372, 376).

On November 13, 1989, nearly one month after the respondent's brief was filed in this matter, plaintiff filed an application to augment the record to include selective excerpts from the reporter's transcript of the oral proceedings in the trial court, which we denied.

An appellant who elects to appeal on the judgement roll is generally bound by his choice. (9 Witkin, Cal Procedure (3d ed. 1985), Sec. 455, p. 447). Absent unusual circumstances, he may not use augmentation as a vehicle to commence all over again to prepare an entirely diffrent form of record. (Russi v. Bank of America (1945) 69 Cal. App.2d 100, 101; see also Estate of Larson, supra, 92 Cal.App.2d at p. 269). Moreover, this court is not required to evaluate those portions of the oral proceedings which plaintiff believes support his view of the evidence without the benefit of a complete transcript or settled statement. (Estate of Larson, supra, at p. 269). On the partial transcript requested by plaintiff this court would be no less bound to presume that the record as a whole contained sufficient evidence to support the trial court's findings.

II

Collateral Estoppel and Unemployment Insurance Appeals Board Mandamus Proceedings

Following termination, plaintiff was initially denied unemployment insurance benefits on the ground that he was discharged for "misconduct" (unemp. Ins. Code, sec. 1256). Subsequently, he successfully petitioned the superior court for a writ of mandamus to compel the Unemployment Insurance Appeals Board to reverse its decision. (Code Civ. Proc., Sec. 1094.5).

In his action for damages against defendant, plaintiff moved the trial court to apply the doctrine of collateral estoppel to prevent relitigation of the superior court's previous finding, for purposes of determining plaintiff entitlement to unemployement insurance benefit that appellant had not been discharged for misconduct. Unemployment Insurance Code section 1960 provides:

"Any finding of fact or law, judgement, conclusion, or final oredr made by a hearing officer, administrative law judge, or any

person with the authority to make findings of fact or law in any action or proceeding before the appeals board, shall not be conclusive or binding in any seperate or subsequent action or proceeding, and shall not be used as evidence in any seperate or subsequent action or proceeding, between an individual and his or her present or prior employer brought before an arbitrator, court, or judge of this state or the United States, regardless of whether the prior action was between the same or related parties or involved the same facts." 1/

Plaintiff argues that on its face the statute is inapplicable to mandamus proceedings in the superior court; therefore, the finding of the superior court that plaintiff was not discharged for "misconduct" is binding upon the superior court in these proceedings. The contention is unavailing. The most reasonable interpreta-

---

1. Unemployment Insurance Code section 1960 was enacted after the conclusion of Unemployment Insurance Appeals Board proceedings in plaintiff's case. The statute was given retroactive effect in Mahon v. Safeco Title Ins. Co. (1988) 199 Cal.App.3d 616, 620-623.

tion of the language of Unemployment Insurance Code section 1960 is that the reference to "'[a]ny finding of fact or law, judgement, conclusion, or final order'" includes an order of the superior court issuing a writ to compel the Unemployment Insurance Appeals Board to reverse a decision denying benefits. (Cf. Pichon v. Pacific Gas & Electric Co. (1989) 212 Cal.App.3d 488, 503). "Moreover if we were to create an exception to this provision for those decisions of the Unemployment Insurance Appeals Board for which a claimant seeks final review by writ of of mandate, the policies behind section 1960, i.e., preservation of the speedy and informal administrative scheme, and recognition of the unfairness of binding the parties in light of the relatively nominal economic stakes of the unemployment insurance proceedings, would be eviscerated in any case where a party excercised its right to obtain review by mandate." (Ibid.)

Apart from the application of Unemployment Insurance Code section 1960, collateral estop-

pel bars litigation of an issue decided at a previous hearing only if the issue necessarily decided at the previous hearing is identical to the one in the pending matter. (Amador v. Unemployment Ins. Appeals Bd. (1984) 35 Cal. 3d 671, 684). The term "misconduct" as used in the Unemployment Insurance Code has been defined in the following manner: "'".... conduct evincing such wilful or wanton disregard of an employer's interests as is found in deliberate violations or disregard of standards of behavior which [an] employer has the right to expect of his employee, or in carelessness or negligence of such a degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer. .. [M]ere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgement or discretion are

not deemed 'misconduct' within the meaning of the statute."'" (Amador at p.678; citations omitted.) An employee's conduct may thus supply "good cause" for discharge yet not constitute "misconduct" sufficient to warrant denial of Unemployment Insurance benefits. (Amador v. Unemployment Ins. Appeals Bd., supra, 35 Cal.3d at pp. 679-680, fn. 4) Since the "misconduct" issue litigated in the administrative mandamus proceeding was not identical to the "good faith" question presented in plaintiff's action for breach of employment contract, the trial court correctly concluded that the superior court's previous finding of no misconduct need not be given collateral estoppel effect.

The orders under review are affirmed. 2/

NOT FOR PUBLICATION.

(SIGNATURE)
FUKUTO

We concur:

(signature), Acting P. J.
COMPTON

(Sig.), J.
GATES

---

2. Plaintiff's appeal from judgement on special verdict is a nullity in light of our affirmance of the trial court's order granting a new trial (Neff v. Ernst (1957) 48 Cal.2d 628, 634).

(COPY)

DEPT. 50

DATE June 9, 1989

SUPERIOR COURT OF CALIFORNIA
COUNTY OF LOS ANGELES

HONORABLE MICHAEL BERG JUDGE

J. CINI DEPUTY CLERK

C 533 582

R. O. SEGRAVES
V.
RALPH M. PARSONS COMPANY

NATURE OF PROCEEDINGS

-PLAINTIFF'S MOTION FOR JUDGEMENT NOTWITHSTANDING THE VERDICT
-PLAINTIFF MOTION FOR NEW TRIAL
-DEFENDANT'S MOTION FOR JUDGEMENT NOTWITHSTANDING THE VERDICT
-DEFENDANT'S MOTION FOR NEW TRIAL

In this cause, heretofore submitted on May 30, 1989 the court announced its decision as follows:

Judgement notwithstanding the verdict for defendant under CCP 629 to this extent only: $ 60,001.00 of the recovery of plaintiff,

DEPT. 50

MINUTES ENTERED
JUNE 9, 1989
COUNTY CLERK

MINUTE ORDER

inasmuch as that amount of the jury verdict is against the law. Foley vs. Interactive Data Corp. 47 Cal.3d 654 is fully retroactive under Newman vs. Emerson Rado Corp. filed May 25, 1989. There can be no tort recovery by plaintiff for $ 60,000.00 for bad faith or a punitive damage award here $ 1.00.

Defendant's motion for new trial is granted on the grounds of the evidence was insufficient to justify the jury's verdict for the remaining $ 418,612.00 in favor of plaintiff. Although plaintiff also moves for a new trial limited to the issue of damages only, the full circumstances surrounding asserted liability would have to be presented to the jury and the documentary evidence reviewed to allow them to properly assess the damages. For other reasons appearing below, the court does not see fit to so limit the new trial issues as requested by plaintiff. Such new trial can be conducted without the baggage of the inapplicable bad faith tort instructions that were given to the jury before Foley's retroactivity was known.

Newman vs. Emerson Radio Corp. was filed after the jury was instructed in this case.

The plaintiff, a manager for defendant company for eight years, could be terminated only for good cause, i.e. his termination had to be based on a fair and honest cause or reason, regulated by the good faith of the employer. He could not be discharged for a mere pretextual reason.

On 2/10/84, defendant company terminated plaintiff for the following categories of misconduct as set forth in Exhibit 156:

1. Falsification of company records, including time cards and expense reports.

2. Misappropriation of company funds, including personal use of company credit cards.

3. Repeated and prolonged unauthorized absence from the work place, field and/or from the office premises.

4. Misuse of company facilities, including telephones for personal use.

The first ground is listed as a major offense of the company's written policy of personal conduct, Exhibit 317. A major offense alone can justify termination. Exhibit 316 sets forth the company policy for termination as a result of misconduct.

The court concludes that the weight of the convincing evidence shows that plaintiff was discharged by defendant company on February 10, 1984 for good cause and in good faith. Prior to plaintiff's termination, Parsons caused a through audit to be done of plaintiff's travel and expense reports and the use of Parsons' telephone credit card by plaintiff. Most significantly, in reviewing this motion Parsons reached the conclusion that plaintiff made false entries on defendant company records which records are ustilized as a basis for billing the company's clients. Exhibit 323 a part of the audit investigation that was made includes a tracing of plaintiff's use of the company's credit cards for personal use including personal air travel and personal

phone calls, locations reported by plaintiff, charges claimed by him, his time cards, expense reports and the jobs charged based on his submitted reports. This period covered is from January 1 through September, 1983.

The majority of the reports deal with "abuse" of the company credit card for personal use. Since the company had a generally liberal policy with respect to use of the company credit cards (testimony of Mr. Fincannon) plaintiff's large scale personal use standing alone is not the basis of granting this motion. Also, defendant's forms for reporting phone charges contain this: "If any calls are personal, attach your check plus 3 % tax.

The court's focus of attention in reviewing the sufficiency of the evidence is with respect to the subject of falsification of records. February 24, 25 and 26, 1983. Plaintiff's reports indicate that he travelled by car on February 24th to inspect Parsons' PG&E Project at the Geyers, California which is near Santa

Rosa, California. The plaintiff's expense report for February 24, 1983 indicates he drove 500 miles to Santa Rosa at cost of $ 100.00, spent $ 44.00 on meals and $ 28.60 for a motel in Santa Rosa. He filed a time report indicating that he spent 8 hours on the job which time was billed to the client.

Parsons records including Exhibit 312 indicate that the plaintiff was in Las Vegas between 1:46 and 6:02 p.m. This is confirmed through telephone records. Plaintiff purchased a return airline ticket, Las Vegas-Oakland-Las Vegas. He rented a Hertz car at Oakland airport at 8:00 p.m. He later paid Parsons for this as his personal expense. Plaintiff charged Parsons' client for 8 hours of time on the 24th but by his own testimony he was in Las Vegas on personal business a good portion of that day.

With respect to February 25, plaintiff agreed that his auto travel and expense statement was incorrect to the extent of the mileage charged and a charge for a second night at a motel.

He charged Parsons' client for 8 hours of work February 25, whereas, in fact, he spent approximately 2 hours inspecting The Geyers' plant on that date. At 11:20 a.m., he was in Vallejo, California, which is about 60 miles south of the job site, at approximately noon on that day, he returned to the Oakland airport and then was on his way back to Las Vegas. See Exhibit 312 with respect to audit for this period of time. Plaintiff's reports for February 26 indicate that he drove 500 miles from Santa Rosa to Los Angeles for a cost of $ 100. plus $ 28.90 on business related meals. Company records show that he was at Inglewood LAX airport at 1:25 p.m., so that plaintiff flew from Las Vegas to Los Angeles on the date that he reported the return auto trip to the Los Angeles area.

Plaintiff made false entries on his time card for August 25, 1983. The evidence was undisputed that plaintiff's time card that was turned in by him for the above date showed that he spent 8 hours on a job on that day, 7 hours

working for Petromin-Shell, and 1 hour working for Tenneco. The evidence was also undisputed that plaintiff was in Las Vegas on personal business in the afternoon of August 25, 1983, and that he paid for an airline ticket from Los Angeles to Las Vegas for that day using a Parsons' credit card. This is a clear case of false entries being made on Parsons' records resulting in Parsons' billing the clients for 8 hours of work for August 25 which work was not performed that time by plaintiff who was doing personal business in Las Vegas.

Plaintiff's explanations include the belief that he might have turned in a corrected time card or two. However, the testimony from Mr. Dan Schiff, who conducted an audit was that the files had been searched for corrected time cards and none had been discovered. Other justifications offered by Mr. Parsons (sic) included his not having claimed substantial amounts of overtime representing uncompensated services for the company on other occasions. It was also suggested that the time cards were

only a kind of formality that he had to comply within advance of the events actually experienced. However, this last contention is not supported by the evidence. The company reasonably relied on the records to bill its clients. Parsons reasonably expected honest accounts of honest work done. Plaintiff's testimony regarding his feelings of justification for these false entries do not alter his clear cut duty to his employer.

From the totality of the evidence, which includes all of the audit's conclusions, the court does not find that there was an absolute prerequite that the plaintiff be counseled or placed on probation. The employer had an honest and good faith purpose in terminating the employment.

Illustrative of other audit conclusions reached by Parsons is the following relating to abuse of sick leave benefits on September 19th and 20th, 1983. Plaintiff reported he was sick on these days. But the records show, and plaintiff does not essentially dispute, that

he was travelling in Utah and Nevada by auto on Monday, September 19th as follows:

9:18 a.m. at Orem, Utah.
11:02 a.m. at Provo, Utah
12:55 p.m. at Provo, Utah
5:30 p.m. at Beaver, Utah
(midway between Provo and Las Vegas)
8:16 p.m. at Mesquite, Nevada.

On Tuesday the 20th:

8:41 a.m. at Las Vegas, Nevada
8:44 a.m. at Las Vegas, Nevada
11:54 a.m. at Las Vegas, Nevada
3:29 p.m. at Jean, Nevada
4:06 p.m. at Jean, Nevada
4:13 p.m. at Jean, Nevada
5:38 p.m. at Baker, California.

See Exhibit 311.

Plaintiff's testimony regarding diarrhea preventing his being at work on Monday while he is otherwise running around in his car is not convincing to this court.

There was a thorough investigation and discussion within the defendant company before the eventual decision to terminate was made. Plaintiff's supervisor, Mr. Cumare, reviewed plaintiff's telephone charge records in the latter part of 1983 or early 1984 and was suspicious of plaintiff's activities and whether he was properly accounting for where he was

and what he was doing. He discussed this with the Assistant Division Manager, Mr. Burns, and it was decided to conduct an internal audit of plaintiff's telephone records, time records and travel expense statements. This subject was discussed with Mr. Larry Fincannon, Controller, who later caused Mr. Dan Schiff to prepare the audit of plaintiff's documents that had been submitted. Mr. Schiff's audit results appear in Exhibit 323 a binder containing numerous pages of company records and audit information. These results were discuss- with Mr. Cumare and then with three or four of the top management personnel of Parsons Company. Following this review, the decision was made to terminate plaintiff's services.

Plaintiff offers speculative inferences that the real reason he was terminated was a personality clash with his supervisor, Mr. Cumare, or becaues plaintiff helped an employee, Mr. Dove, who met initial company resistance.

The court concludes that the evidence shows that there was an honest and good faith reason to terminate plaintiff and not a mere pretext. The basis was the falsified company records. "Subterfuges and evasions violate the obligation of good faith in performance, even though the actor believes his conduct is justified." See, Witkin, Contracts, Summary of California Law, Ninth Edition, Section 744, including the Restatement of Contracts, Second Edition, Section 205.

Parsons' motion for judgement notwithstanding the verdict covering plaintiff's contractual claims under Foley is denied. Plaintiff's motions are denied. The court recuses (sic) itself from hearing the retrial of this case.

Because of plaintiff's indigency the court recommends a waiver re posting of new jury fees by plaintiff.

A copy of this order is sent by U.S. Mail Mail this date to counsel for all appearing parties and Mr. Segraves in Propria Persona, A certificate of mailing is executed and filed and a copy mailed to each side.

Judgement on Special Verdict filed 4-17-89 is hereby vacated.

MINUTES ENTERED
DEPT. 50 JUNE 9, 1989
COUNTY CLERK

MINUTE ORDER

No. 90-100 (2)

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

R. O. SEGRAVES,

Petitioner,

vs.

RALPH M. PARSONS COMPANY,

Respondent.

ON APPEAL FROM THE
SUPREME COURT OF CALIFORNIA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

WILLIAM S. GARR
HAHN & HAHN
301 East Colorado Boulevard
Pasadena, California 91101
(818) 796-9123

Attorneys for Respondent
RALPH M. PARSONS COMPANY

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Cases

Constitutional and Statutory Provisior

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

R. O. SEGRAVES,

Petitioner,

vs.

RALPH M. PARSONS COMPANY,

Respondent.

On Appeal from the

Supreme Court of California

Brief in Opposition to Petition for Writ of Certiorari

SUMMARY OF ARGUMENT

California's civil judicial system exceeds the due process requirements of the United States constitution such that there is no question of law at issue that justifies the granting of a Writ of Certiorari by the United States Supreme Court. The State of California has afforded Petitioner all assistance required by the United States Constitution for indigent, civil litigants.

STATEMENT OF THE CASE

Neither the State of California nor any other governmental entity is a party to this lawsuit. It involves two private parties.

Petitioner filed his Complaint on

February 6, 1985. Respondent's Answer was filed on March 12, 1985 and the case was assigned for trial on March 28, 1989 before the Honorable Michael Berg, Superior Court of California, County of Los Angeles.

On that date, Motions in Limine were presented to Judge Berg. One of the pre-trial Motions included Respondent's Notice of Motion and Motion in Limine to exclude findings, conclusions and the judgment of Unemployment Insurance Appeals Board and the Court in a Petition for Writ of Mandate Proceeding. Respondent's Motion in Limine was granted and the findings, conclusions and the judgment of the Unemployment Insurance Appeals Board and the Court in the Petition for Writ of Mandate Proceeding were excluded from

the trial. Petitioner filed his Amended Complaint on March 28, 1989 and the trial began March 29, 1989. Respondent's Motion for Judgment of Nonsuit was argued on April 7, 1989 before Judge Berg after presentation of the evidence. The Order Granting Respondent's Motion for Judgment of Nonsuit was filed on April 13, 1989.

The jury verdict was entered on April 17, 1989 giving Judgment for Petitioner. Subsequently, post- trial motions were filed by both Petitioner and Respondent including: (1) Petitioner's Motion for Judgment Notwithstanding the Verdict on Damage Issues; (2) Petitioner's Motion for a New Trial on Damages Only; (3) Respondent's Motion for Judgment Notwithstanding the Verdict; and

(4) Respondent's Motion for New Trial. The post-trial motions were argued and submitted on May 30, 1989. Judge Berg's 7-page Minute Order was entered on June 9, 1989 granting Respondent's Motion for New Trial and partially granting Respondent's Motion for Judgment Notwithstanding the Verdict.

Petitioner appealed the trial court's Order to the California Court of Appeal. When Petitioner filed his Notice of Appeal, he elected to proceed by appendix in lieu of a clerk's transcript and initially requested preparation of a reporter's transcript, including all oral proceedings. Cal. Rules of Court rule 5.1. Thereafter, Petitioner withdrew his request for preparation of a reporter's transcript and notified the Court of Appeal of his intention to

proceed on the judgment roll. Cal. Rules of Court rule 5(f).

The Court of Appeal affirmed the trial court's Order on December 20, 1989.

The California Supreme Court denied Petitioner's request for Review After Judgment by the Court of Appeal on March 14, 1990.

STATEMENT OF FACTS

Petitioner filed his lawsuit claiming damages for the alleged wrongful termination of his employment by Respondent based upon breach of contract and the implied covenant of good faith and fair dealing. Petitioner also claimed damages for libel and intentional and negligent infliction of

emotional distress.

Petitioner was hired by Respondent on June 1, 1976, as a Chief Process Engineer, and remained employed by Respondent for approximately eight (8) years. Petitioner was discharged by Respondent on February 10, 1984, for good cause and in good faith. The factors of good cause fell into the categories of (1) falsification of Respondent's records, (2) misappropriation of Respondent's and Respondent's client's funds, (3) willful violation of Respondent's sick leave policy and (4) absence from Respondent's office without authority.

Prior to Petitioner's termination, Respondent caused a thorough audit to be done of Petitioner's travel and expense

reports and the use of Respondent's telephone credit card by Petitioner. The audit disclosed that Petitioner: (1) substantially abused the use of Respondent's telephone credit card, (2) falsified Respondent's records, (3) misappropriated Respondent's and Respondent's client's funds, (4) willfully violated Respondent's sick leave policy and (5) was absent from Respondent's office without authority.

Respondent had good cause to terminate Petitioner's employment and at all times acted in good faith. Therefore, there was no breach of contract or the implied covenant of good faith and fair dealing.

Petitioner's claims for libel and intentional and negligent infliction of

emotional distress were dismissed by the trial court on Respondent's request for a nonsuit on those claims.

ARGUMENT

I.

THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION DOES NOT REQUIRE STATES TO PROVIDE INDIGENT, CIVIL PLAINTIFFS WITH FREE REPORTER'S TRANSCRIPTS.

While the United States Supreme Court has rendered several decisions outlining what assistance States must provide indigent criminal and civil litigants, the Court has never indicated that indigent, civil litigants were entitled to a free transcript.

In Boddie v. Connecticut, 401 U.S. 371 (1971), the Court held unconstitutional, as applied to indigents, a State requirement that individuals pay court fees and costs of about $60 in order to

sue for divorce. Justice Harlen delivered the opinion of the Court: "We do not decide that access for all individuals to the Courts is a right that is, in all circumstances, guaranteed by the Due Process Clause," but only that, "given the basic position of the marriage relationship in this society's hierarchy of values and the concomitant state monopolization of the means for legally dissolving this relationship, due process does prohibit a State from denying, solely because of inability to pay, access to its courts to individuals who seek judicial dissolution of their marriages." Id. at 374-376, 382-383.

In United States v. Kras, 409 U.S. 434 (1973), the Court upheld a provision of the Bankruptcy Act requiring individuals seeking voluntary discharge to pay

costs and fees of about $50. Justice Blackman delivered the opinion of the Court:

> "The denial of access to the judicial forum in [Boddie] touched directly on the marital relationship and on the associational interest that surround the establishment and dissolution of that relationship. On many occasions we have recognized the fundamental importance of these interests under our Constitution. [Kras'] alleged interest in the elimination of his debt burden does not rise to the same constitutional level. If Kras is not discharged in bankruptcy, his position will not be materially

altered in any constitutional sense." Id. at 444-445.

In Ortwein v. Schwab, 410 U.S. 656 (1973), the Court, in a per curiam opinion, upheld a $25 Appellate Court filing fee as applied to indigents who sought to appeal administrative decisions reducing their welfare benefits:

> "[The interest in increased welfare benefits,] like the interest at issue in [Kras] has far less constitutional significance than the interest of the [Boddie] appellants. . . . Each of the present appellants has received an agency hearing, and this Court has long recognized that, even in criminal cases, due process does not require a

> State to provide an appellate system. . . . Under the facts of this case, appellants were not denied due process. . . . Nor does the filing fee violate equal protection on the ground that it discriminates against the poor.
>
> . . . As in Kras, this litigation 'is in the area of economics and social welfare' and the applicable standard is thus that of rational justification." Id. at 659-660.

Clearly, the Fifth Amendment of the United States Constitution does not require California to provide Petitioner with a free transcript. Petitioner's interest in his claim against Respondent, "has far less constitutional signifi-

cance than the interest of the Boddie appellants." Petitioner's claims against Respondent are in the "area of economics and social welfare." Petitioner's claims against Respondent received a full hearing in the California trial court.

While California is not required to provide an appellate system to review its trial court's decisions, the California Court of Appeal did waive Petitioner's filing fees. California is not constitutionally mandated to waive the cost of a transcript to facilitate Petitioner's appeal.

In addition and very important in this case, Petitioner withdrew his request for a reporter's transcript and elected to proceed on the judgment

role. Cal. Rules of Court rule 5(f). Accordingly, Petitioner waived his right to a reporter's transcript. Thus, the Petition for Writ of Certiorari should be denied.

II.

THE SEVENTH AMENDMENT OF THE UNITED STATES CONSTITUTION DOES NOT APPLY TO STATE COURT PROCEEDINGS

The United States Supreme Court has held the Seventh Amendment of the United States Constitution is not a fundamental aspect of due process or the liberty protected by the due process clause of the Fourteenth Amendment so that it is not applicable to State court proceedings. Minneapolis and St. Louis Railroad Co. v. Bombolis, 241 U.S. 211 (1916); Justice Holmes' comments in Chicago, Rock Island & Pac. Ry. v. Cole, 251 U.S. 54, 56 (1919). Accordingly, the Seventh

Amendment does not afford Petitioner a foundation on which to predicate his Petition.

Even if the Seventh Amendment was applicable to State court proceedings, both the Federal and State judicial systems have recognized the trial court's prerogative to regulate various procedural aspects of jury trials, by granting motions for summary judgment, new trial, directed verdict and judgment notwithstanding the verdict. The major constitutional justification for these procedures is that analogous devices existed at common law.

The United States Supreme Court has ruled that the important fact is that at common law there was some mechanism by which the judge could determine that the

evidence was insufficient for the jury to consider or that the evidence was insufficient to support the jury's verdict. Galloway v. U.S., 319 U.S. 372, 391 (1941); Baltimore & Carolina Line, Inc. v. Redman, 295 U.S. 654, 659 (1934); Neely v. Martin K. Eby Constr. Co., 386 U.S. 317 471 (1967).

The California Constitution incorporated the common law as it existed in 1850. Accordingly, California enacted specfic statutory provisions regarding a judge's authority to order a nonsuit, judgment notwithstanding the verdict and new trial. Cal. Code of Civ. Pro. §§581c, 629 and 659.

Petitioner's reliance on the Seventh Amendment of the United States Constitution is misplaced. The Seventh

Amendment is not applicable to State court proceedings and the California Legislature has enacted specific statutory provisions authorizing trial court judges to make orders granting a nonsuit, judgment notwithstanding the verdict and new trial. Accordingly, the Petition for Writ of Certiorari should be denied.

III.

THE UNITED STATES SUPREME COURT DOES NOT HAVE JURISDICTION TO REVIEW PETITIONER'S STATE LAW ISSUES.

The apparent intent of Petitioner's Questions Presented Numbers 3, 4 and 5 is to bring State law issues before the United States Supreme Court. Questions 3, 4 and 5 raise State law issues which are not properly before this Court under Petitioner's jurisdictional basis, 28 U.S.C. §1257, unless Petitioner is infer-

ring some type of United States Constitution due process violation.

A. California Courts are Accountable in Writ of Mandate Proceedings.

California Code of Civil Procedure sections 1067-1110b set forth California's appellate review process. Petitioner requested review by both California's intermediate Court of Appeal and Supreme Court.

Review by the California Supreme Court of a decision rendered by the California Court of Appeal in a civil matter is discretionary. Petitioner's request for Review After Judgment By The Court Of Appeal was denied by the California Supreme Court on March 14, 1990 as was Petitioner's Petition for Writ of Mandate.

Therefore, the issues raised by Petitioner's Questions Presented Numbers 3, 4 and 5 were presented to the Supreme Court of California by Petitioner. The Supreme Court of California denied Petitioner's request for review. Accordingly, the Petition for Writ of Certiorari should be denied.

B. The Tort and Punitive Damages Awarded By The Jury Violated California Law.

The tort damages including punitive damages for breach of the implied covenant of good faith and fair dealing awarded by the jury violated California law as set forth in Foley v. Interactive Data Corp., 47 Cal.3d 654 (1988) which was made retroactive by the California Supreme Court in Newman vs. Emerson Radio Corp., 48 Cal.3d 973 (1989).

The Foley court stated:

". . . [W]e hold that tort remedies are not available for breach of the implied covenant in an employment contract to employees who allege they have been discharged in violation of the covenant." Id. at 700.

Subsequently, the Newman court held:

"We conclude that there is no compelling reason to depart from the general rule of retroactive application of judicial decisions in this case. . . Accordingly, we hold that Foley vs. Interactive Data Corp., supra, 47 Cal.3d 654, shall be given full retroactive effect

as to all cases not yet final on January 30, 1989, the date that decision became final."

Clearly the tort and punitive damages awarded by the jury for breach of the implied covenant of good faith and fair dealing were against the law as set forth by the California Supreme Court and the trial judge properly granted Respondent's Motion for Judgment Notwithstanding the Verdict on the tort and punitive damage awards. Petitioner's request for review of this issue was denied by the California Supreme Court on March 14, 1990. Accordingly, the Petition for Writ of Certiorari should be denied.

CONCLUSION

For all of the above reasons,

Respondent respectfully requests that this Court deny the Petition for Writ of Certiorari.

Dated: August 1, 1990

Respectfully submitted,
William S. Garr
HAHN & HAHN

By: _____
William S. Garr
Attorneys for
Respondent The Ralph
M. Parsons Company

No. 90-100

IN THE SUPREME COURT OF

THE UNITED STATES

OCTOBER TERM 1990

R. O. SEGRAVES, PETITIONER

v.

RALPH M. PARSONS COMPANY,
a Nevada Corporation;
FELIX CUMARE, an individual;
and DOES 1 through 30, inclusive,

PETITIONER'S REPLY

TO RESPONDENTS' BRIEF IN OPPOSITION TO

PETITION FOR WRIT OF CERTIORARI

ROBERT O. SEGRAVES, PETITIONER
138 West Main St. - Suite 124
Ventura, CA 93001
(805) 985-4238

SUMMARY

Respondents' brief erroneously presented, as facts, allegations which they failed to prove at previous hearings and at trial. They also claim US Constitution Amendment 7 does not apply to case, whereas Amendment 7's last clause does apply. Reviewing case's history, the weight of evidence justified the jury's unanimous verdict favoring petitioner and the trial judge erred in ordering a new trial.

Petitioner's rights under US Constitution, Amendments 5, 7, and 14, were denied because of inadequate appellate review. Reporter's transcript was essential to appellate review; but, such transcripts are not available (free) to indigents in California. Thus indigents and petitioner's rights under 5th, 7th and 14th Amendments as well as rights under California Constitution and statutes are and were denied.

It is also obvious petitioner did not and cannot receive a fair trial in California's courts; therefore, any re-trial must be in a federal court.

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RESPONDENTS' STATEMENT OF THE CASE IS ACCURATE EXCEPT FOR ONE POINT:

In appealing orders throwing-out jury's unanimous verdict favoring petitioner, petitioner did not choose to proceed on judgement roll when he withdrew his request for a reporter's transcript. He had no choice, because he could not afford the $ 7,000.00 for the transcript.

Filing fees were waived in accordance with California Government Code, Sec. 68511.3; but, courts did not waive reporter-transcript costs, citing Rohnert Park vs Superior Court (1983) 146 CA3d 420, 193 CR 33, where the court denied an indigent a free reporter's transcript based on a common-law rule that is contrary to and superseded by Cal. Govt.Code Sec. 68511.3, the Calif. Cons. Art.1, Sec.7, plus a California Supreme Court opinion, Payne v Superior Court (1976) 17 C3d 908, 132 CR 405, 553 P2d 565, where the court said,

"while the constitutional right of access to the courts has for the most part been related to criminal convictions, particularly by writs of habeas corpus, the due process right is

much broader; it includes access to all courts both state and federal, without regard to the type of petition or relief sought."

In People v Becker (1952) 239 P2d 898, 108 CA2d 764, the California appellate court said,

"the right of every man to his day in court is not limited to trial court but embraces as well his day in appropriate reviewing court,"

In Walker Mining v Industrial Acc. Commission (1939) 95 P2d 188, 35 CA2d 257, the court said:

"The administration of justice is founded upon the principle that every litigant shall have a fair opportunity to present to the court material evidence in support of his valid claim."

The court's reasoning in Rohnert Park, supra, was not only contrary to foregoing authorities, it defied logic in concluding the legislature would waive relatively small $ 200 filing fees and then burden indigents with much greater costs ($ 7,000.00) for reporters' transcripts.

This same right of due process is guaranteed by the Fifth and 14th Ammendments to the US Constitution which will be discussed later.

RESPONDENTS' STATEMENT OF FACTS IS NOT ACCURATE MERELY RESTATING ALLEGATIONS WHICH THEY FAILED TO PROVE.....

in their appeal of Employment Office decision, in hearing on Writ of Mandamus against Appeals Board and at trial when jury found unanimously for petitioner and judgement entered on verdict.

Petitioner must once again remind a court not to be influenced by repondents' mis-statement of facts; however, petitioner is confident this Court will consider only legal questions raised by his petition. Still, petitioner is compelled to comment on specific, erroneous "facts."

On page 6, respondents say, "petitioner was hired as a "Chief Process Engineer" which is erroneous. Respondents' letter of May, 1976, a trial exhibit, offered employment as "the Director of Plant Operations." Respondents' failure to properly classify petitioner was respondents' first breach of the contract.

Respondents say, "Petitioner was discharged by respondents on February 10, 1984 for good cause and in good faith." But, the jury found respondents acted in bad faith and with malice,

as did Employment Office, Appeals Board and Judge at hearing on Writ of Mandate.

Respondents' say on page 7, "Petitioner's claim for libel and intentional infliction of emotional distress were dismissed by trial court on Respondents' request for nonsuit on those claims." But, they fail to say the nonsuit motion was on grounds employers enjoy a privilege which provides immunity from law suits but the qualified privilege is destroyed by malice and the jury found respondents guilty of malice which destroyed their qualified privilege.

Summarizing, respondents terminated contract, claiming petitioner violated rules which did not exist and abused rules which did not exist (by their own testimony). They also presented policy manuals into evidence, but failed to show these unilateral policies were provisions of the contract, i.e. no mutual manifestation of assent with respect to these unilateral policies was ever shown. Yet, the trial judge granted motion for new trial, citing these unilateral policies as grounds for granting their motion.

I. TO COMPLY WITH CONSTITUTIONAL RIGHTS TO DUE PROCESS, INDIGENT, CIVIL LITIGANTS MUST BE PROVIDED FREE REPORTER'S TRANSCRIPTS ON APPEAL.

Respondents' brief points out the United States Supreme Court has made several decisions in this area but never specifically dealt with indigents' right to free reporter's transcripts. In Boddie v Connecticut, 401 US 371 (1971) the court held that indigents were not required to pay court costs in order to sue for divorce:

> "given the state monopolization of the means for dissolving the relationship, due process does prohibit a state from denying, solely because of inability to pay, access to its courts to individuals who seek judicial dissolution of their marraiges."

But, the court held the constitutional right did not apply to waiver of fees in a voluntary bankruptcy case, United States v Kras 409 US 434 (1973), nor in a welfare-benefit-appeal case, Ortwein v Schwab 410 US 656 (1973).

Respondents say civil litigants are not entitled to free reporters' transcripts on appeal, saying petitioner's interest in his

claim against respondents "has far less constitutional significance than the interests of the Boddie appellants." Respondents also say petitioner's claims against respondents is in the area of economics and social welfare. Nothing could be further from the truth. This case is not a welfare case nor a voluntary bankruptcy. **This case involves breach-of-contract** !!!

Respondents say petitioner's claims against respondents received a full hearing in trial court. Respondents' subjective approach ignores right of equal access to appeals courts where there is a monopolization of this avenue of justice in "breach-of-contract" cases such as present case. Their approach also ignores that petitioner's appeal was from an ORDER granting respondents a new trial and the entire process violated the US Constitution's 7th Ammendment.

Respondent is a billion-dollar corporation, whereas petitioner is an indigent senior citizen (because of respondents malicious actions). So, equal access to appeals court was impossible without the free reporter's transcript.

Petitioner's appeal was also from a nonsuit, preventing jury from considering many causes of action, thus denying due process. If petitioner is entitled to due process on appeal, this must extend to reporters' transcripts as well as filing fees. Otherwise, indigents will always be automatically denied access to complete review of their appeal by appellate courts; and, therefore, they will also be automatically denied a a favorable decision without transcripts.

Respondents' last point mentioned in last paragraph on page 13, again attempts to take advantage of petitioner's indigence by saying petitioner waived rights to reporter's transcript when he withdrew his request for a transcript.

As stated earlier in this brief, petitioner had no choice, because he simply could not afford the $ 7,000.00 cost involved.

This did not amount to a waiver of a right simply because petitioner could not afford to exercise his right to a reporter's transcript and the due process associated with it.

II. LAST CLAUSE OF SEVENTH AMMENDMENT OF UNITED STATES CONSTITUTION APPLIES TO ALL COURTS IN THE USA INCLUDING STATE COURTS

United States Code Service, Constitution, Ammendment 7 at page 739 says, "Last clause of the Seventh Ammendment is not restricted in its application to suits at common law tried before juries in courts of the United States, and it applies equally to case tried before jury in state court, and brought to Supreme Court by writ of error from highest court of state." citing Chicago, B. & Q. R. Co. vs Chicago (1897) 166 US 226, 41 L Ed 979, 17 S Ct 581. So, again respondents aren't correct saying, "THE SEVENTH AMMENDMENT OF THE UNITED STATES CONSTITUTION DOES NOT APPLY TO STATE COURT PROCEEDINGS." USCS also says on same page 739 "Motion for a new trial on ground of insufficiency of evidence would not be granted unless jury verdict was at least against the great weight of evidence, lest trial court intrude upon jury's function and affect litigant's Seventh Ammendment rights; jury verdict would be upheld despite conflicting evidence.." citing

Spurlin v General MotorsCorp. (1976, CA5 Ala) 528 F2d 612, reh den (CA5 Ala) 531 F2d 279. Next paragraph of USCS says, "Although general rule is that District Court's denial or grant of new trial is within its discretion and ordinarily nonreviewable, in order to protect litigant's Seventh Ammendment rights and prevent improper intrusion on jury's function, somewhat broader review applies to order granting new trial as opposed to order denying such motion, and greatest degree of scrutiny is exercised when new trial is granted on ground that verdict is against the weight of evidence." citing Evers v Equifax, Inc. (1981, CA5 Ga) 650 F2d 793. Similar standards apply to appeal court review of ORDERs granting a new trial in California courts; but, in present case, those standards were not applied because of lack of reporter's transcript. Appellate court could and should have supplemented record with part or all of reporter's transcript to insure petitioner's Ammendment 7, 14 and 5 rights as well as his state constitutional rights.

III. UNITED STATES SUPREME COURT HAS JURISDICTION TO REVIEW ANY POSSIBLE VIOLATION OF LAST CLAUSE OF SEVENTH AMENDMENT TO US CONSTITUTION; THEREFORE, RESPONDENTS ARE CORRECT IN SAYING PETITIONER INFERS THERE WAS A VIOLATION OF DUE PROCESS UNDER US CONSTITUTION WITH RESPECT TO LAST THREE QUESTIONS RAISED BY HIS PETITION.

It appears respondents have not read the Petition for Writ of Mandate. Appeals court denied petitioner's application for waiver of filing fee when he attempted to file his Petition for Writ against lower court. The denial violated Sec. 68511.3 and denied petitioner due process. State Supreme Court did not deny application for waiver of filing fee but did uphold the violation by denying his petition for writ.

Lastly, tort and punitive damages for tortious breach of covenant are matters of fact decided by jury and the Foley decision could not alter facts without appellate review because Ammend 7 rights would be denied; therefore, this entire case does fall under the jurisdiction of the US Supreme Court and the court must rule favorably on the petition for writ of certiorari to insure due process, not only for petitioner but also for others, particularly indigents.